UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION SIX

TSL, LTD.1

Employer

and Case 6-RC-12727

GENERAL TEAMSTERS, CHAUFFEURS AND HELPERS, LOCAL NO. 249 a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

Modern Transportation Services, Inc., herein called Modern, is engaged in the transportation of dry bulk material. TSL, Ltd., herein called TSL, is engaged in the leasing or supplying of employees to clients. TSL employs approximately 20 drivers, one mechanic, one utility employee and one clerical employee at Modern's terminal in the Green Tree section of Pittsburgh, Pennsylvania, and approximately ten drivers at Modern's terminal in Williamsport, Pennsylvania.² The Petitioner, General Teamsters, Chauffeurs and Helpers, Local No. 249 a/w International Brotherhood of Teamsters, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all full-time and regular part-time hourly drivers and mechanics employed by Modern and TSL as joint employers at the Pittsburgh and Williamsport, Pennsylvania, facilities; excluding office clerical

¹ The name of the Employer reflects my decision regarding the joint employer status of the two entities involved herein.

² The Green Tree terminal is also known as the Rook Terminal. This terminal is comprised of a large garage building and silos located next to a rail yard. The Williamsport terminal is also known as the Avis Terminal.

employees and guards, professional employees and supervisors as defined in the Act. No hearing was held in the instant matter as all parties waived their respective rights to a hearing. In so doing, all parties executed a waiver stipulating that the issues of this case were previously litigated on November 23 and 24, 2009, in Case 6-RC-12706 involving the same parties. Therein, the parties agreed that the record testimony, exhibits and documentary evidence would be used to resolve the three issues which were not resolved in my Decision and Order which issued on December 11, 2009.³ The alleged joint employers each filed a timely brief in Case 6-RC-12706 which have been duly considered in this matter. The Petitioner did not file a brief. TSL filed a supplemental brief in support of its position in this case and it has also been duly considered.

The evidence of record and the briefs reveal that the parties disagree on three issues. The Petitioner contends that TSL and Modern constitute a joint employer. Contrary to the Petitioner, TSL and Modern both contend that TSL is the sole employer of the employees at issue herein. While the parties appear to be in agreement with the scope of the petitioned-for unit, the parties disagree as well regarding some aspects of the composition of the unit. Specifically, the parties disagree as to the inclusion of utility employee or "jack-of-all-trades" James Fallon and clerical employee Samantha Evans, both of whom are located at the Green Tree terminal. The Petitioner contends that neither of these employees should be included in the petitioned-for unit, whereas TSL and Modern each contend that both employees must be included in any unit found appropriate herein based on community of interest considerations. There is no history of collective bargaining for any of the employees involved herein. The Petitioner has advised that it will proceed to an election in any unit found appropriate.⁴

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³ The Petitioner filed a Request for Review of that Decision which was subsequently denied.

⁴ I note that in my Decision in Case 6-RC-12706, I concluded that the petitioned-for unit in that case, a unit limited to drivers who work out of the Green Tree terminal, was not an appropriate unit for the purposes of collective bargaining. I also concluded that the mechanic at the Green Tree terminal must be included in a bargaining unit with the drivers. Because, at that time, the Petitioner would not proceed to an election in a unit that included either the drivers working out of the Williamsport terminal or the mechanic, I dismissed the petition. Due to the foregoing, I did not resolve the joint employer status of Modern and TSL or the unit placement issues relating to the utility employee and the clerical employee, all of which were raised and litigated in that case.

I have carefully considered the record evidence and the arguments presented by the parties on the three remaining issues to be determined. As discussed below, I have concluded that Modern and TSL are not a joint employer, as alleged in the petition. While I have concluded that the utility employee at the Green Tree terminal must be included in the bargaining unit, I have also concluded that it can not be determined from this record if the clerical employee should be included in the bargaining unit. Therefore, the clerical employee will be permitted to vote under challenge.

Accordingly, I am directing an election in the unit set forth herein which is appropriate for the purposes of collective bargaining, the composition and scope of which takes into account my findings detailed below as well as in my Decision in Case 6-RC-12706.

To provide a context for my discussion of the issues, I will first provide a general overview of the trucking operations. Then, I will present in detail the facts and reasoning that support my conclusions on the three issues raised in this case.

I. OVERVIEW OF OPERATIONS

Modern is engaged, inter alia, in the transportation of dry bulk material, such as sand used in "fracing" operations to extract natural gas from gas wells. Although Modern has terminals in several states, the two terminals involved in this proceeding are its only terminals that perform services related to fracing operations. As noted, the Green Tree terminal has approximately 20 drivers, one mechanic, one utility employee and one clerical employee. The Williamsport terminal has approximately ten drivers. Modern has local offices in Sewickley and Portersville, Pennsylvania, both of which are in the greater Pittsburgh area.

TSL is engaged in the business of leasing employees to companies. TSL services

Modern in locations other than those involved in the instant case, and has clients in addition to

Modern. TSL is currently headquartered in Toledo, Ohio, and has a local office in Midland,

Pennsylvania, also near Pittsburgh.

Pennsylvania Department of State records indicate that Modern was incorporated in Delaware in 1988 and TSL was incorporated in West Virginia in 1992.⁵ The record establishes that Modern and TSL entered into a contract in early 1993 pursuant to which TSL hires employees and handles all aspects of these employees' employment at the two Modern facilities at issue here. TSL employs all petitioned-for employees domiciled at Modern's Green Tree and Williamsport facilities and TSL employees manage and staff the facilities and operate Modern's equipment. The record establishes that TSL interviews, screens, hires, and trains drivers for Modern. TSL pays and administers benefits to the drivers and other employees located at the Green Tree and Williamsport terminals.⁶ The drivers' paychecks indicate that they are paid by TSL and the record reveals that the paychecks are drawn on a bank account owned by TSL. The record also indicates that TSL arranges for the physicals and drug testing of the drivers pursuant to Department of Transportation ("DOT") requirements.

The 1993 agreement referenced above further provides that TSL charges Modern a flat rate weekly service fee. The record indicates that while the service fee has been modified over the years, there has never been a successor contract executed between the parties. TSL Vice-President Brian Benner testified that he has the authority and discretion to alter the amount of the service fee charged.

The record establishes that Modern's operations at the Green Tree terminal commenced in May 2008. The drivers haul sand used in the drilling process to frac natural gas wells. Due to the customer base located north of Pittsburgh, Modern opened a second facility in Williamsport in late April 2009. Modern leases the tractors that the drivers use and their signs on the cab doors identify them as "Modern" or "MTS" vehicles. Similarly, there is signage at the

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⁵ I have taken official notice of the Commonwealth of Pennsylvania's public records.

⁶ TSL also services Modern terminals in Meadville, DuBois and Butler, Pennsylvania, but these locations do not haul sand and are not involved herein.

Green Tree terminal identifying it to the public as a "Modern Transportation Services" facility.⁷
The drivers have shirts and hats that bear the "Modern" logo and some of the supervisors also wear "Modern" shirts.

The Green Tree and Williamsport terminals, while located 175-200 miles apart, are under the overall supervision of Frac Division General Manager Michael Frisco. Reporting to Frisco is Terminal Manager Rick Shaner who also has responsibility for the workforce at both terminals.⁸

The record reveals that both Frisco and Shaner are TSL employees. Patrick Cozzens is the President of Modern and the record reveals that he is also a TSL employee. Cozzens works out of the Modern office in Sewickley, as is Modern's Director of Safety & Quality Tim Kuhlman and safety person Paul Schulze. Modern Vice-President Bill Doyle is located at Modern's Portersville office. According to the record, Kuhlman, Schulze and Doyle are TSL employees. Frisco, Doyle and Kuhlman have business cards which identify them as being affiliated with Modern and located at Modern's Portersville location. Shaner has similar business cards but they specify his work location as the Green Tree facility.

Also employed by TSL at the Green Tree terminal are mechanic Gary Lamb,¹¹ utility employee James Fallon, and clerical Samantha Evans. As mentioned above, Fallon and Evans are at issue herein. The record indicates that there are no other employees assigned to the Williamsport facility other than the ten drivers.

⁷ The record does not indicate who owns either the Green Tree or Williamsport facilities.

⁸ The parties stipulated that Frisco and Shaner are supervisors within the meaning of Section 2(11) of the Act based on their authority to discipline employees and/or effectively recommend discipline.

⁹ The record does not reveal Schulze's title.

¹⁰ I note that nothing else in the record connects Frisco with Portersville.

¹¹ Lamb's eligibility to vote in an election was at issue in Case 6-RC-12706 and he was included in the bargaining unit for the reasons detailed in that Decision.

All calls from customers are handled by Shaner or Frisco at the Green Tree terminal. There are no other stipulated supervisors working at either the Green Tree or Williamsport terminals. Shaner distributes the loads between the two terminals and determines which driver will haul the load, taking into account all applicable regulations. Shaner personally notifies the drivers at the Green Tree terminal of their assignments. At the Williamsport terminal, however, there is a lead driver, Andy Weslan, who communicates instructions received from Shaner to the Williamsport drivers. Shaner and Weslan have daily telephone contact. Frisco spends at least one day per week at the Williamsport facility.

The drivers submit their paperwork after their deliveries and the documents are later forwarded to Modern's Sewickley office. The invoices that bill the customer for the loads carried are generated from that location.

There is no distinction between the Green Tree and Williamsport terminals in either the type of trucks or trailers utilized or in the skills and duties of the drivers. All drivers are required to maintain a commercial driver's license (CDL), Class A; and all drivers must be capable of operating the pneumatically controlled trailers, a skill which is sometimes taught in-house.

Both terminals operate 24 hours per day, seven days per week. Drivers are called to haul loads at any time of the day or night to meet customer needs and, thus, none of the Green Tree or Williamsport drivers work a set schedule. The record reflects that drivers from both the Green Tree and Williamsport terminals regularly travel between terminals, and they haul sand from either terminal. They also sometimes haul loads of sand to the same wells. The record contains significant documentary evidence consisting of numerous daily logs¹³ of drivers which establish that the Williamsport drivers have worked out of the Green Tree terminal for

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¹² The record establishes that Weslan spends 80 percent of his time driving to and from customer sites to deliver sand and receives similar wages and benefits to the other drivers. There is no contention herein that Weslan has any supervisory authority within the meaning of Section 2(11) of the Act.

¹³ Drivers are required to maintain such logs pursuant to DOT regulations.

successive days on numerous occasions. In addition, the drivers' logs reflect that Green Tree drivers have on numerous occasions worked out of the Williamsport terminal for days at a time. The drivers' logs also show that there are occasions when drivers begin work at one terminal, travel to the other terminal, and then end the day at the first terminal.

II. THE JOINT EMPLOYER ISSUE

The record reveals that all employee relations matters at these two Modern locations are the ultimate responsibility of TSL Vice President Benner, who works at TSL's corporate headquarters in Toledo and reports to TSL President Don Finnegan. Thus, TSL determines the wage rates and benefits provided to its employees who are leased to Modern. The discipline of any employee beyond the warning stage, including all discharges, is decided by Benner. ¹⁴ In addition, all employee benefit questions, FMLA issues, workers compensation and other employee relations matters are handled by Benner. The record establishes that TSL's corporate headquarters processes the payroll for both the Green Tree and Williamsport terminals, based on documents and information provided by the clerical employee at Green Tree. Personnel records for all employees of both terminals are maintained at TSL's office in Midland although some records are kept at Modern's terminals in compliance with DOT regulations. ¹⁵

The drivers employed out of the two terminals, as well as the mechanic, the utility employee and the clerical employee, have uniform benefits. Thus, employees at both facilities have the same health, dental, vision and accidental death and dismemberment insurance.

Vacation benefits are also identical. The mechanic and the utility employee are paid approximately \$16.25 per hour and the clerical employee is paid approximately \$14.25 per hour.

¹⁴ The parties stipulated that Benner is a supervisor within the meaning of Section 2(11) of the Act based on his authority to hire and fire employees.

¹⁵ The record reveals that this is mandatory because Modern, not TSL, possesses the "operating authority" for Modern's transportation business activities.

As discussed below, until November 1, 2009, the drivers at both the Green Tree and Williamsport terminals were paid \$18 per hour.

While the record does not evidence President Cozzens' direct involvement in the drivers' terms and conditions of employment, the record does indicate that he initiated an inquiry which resulted in a reduction in the drivers' wage rate as of November 1, 2009. Benner testified that Cozzens, who is a TSL employee but also president of Modern, asked Benner to see if he could cut expenses. Benner testified that this was not an order and that he was free to accept or reject Cozzens' suggestion. Benner further testified that he subsequently made the decision to cut expenses and decided to do it by reducing the drivers' wages, which proved to be an unpopular decision.

On November 1, 2009, the wage rate of all drivers was reduced \$3 per hour to \$15 per hour after the first hour of detention time, plus 25 percent of the profit on each load. The record indicates that Benner instructed Frisco to meet with the drivers at the Green Tree terminal to discuss this change. Ultimately, Shaner and Cozzens also attended the drivers' meeting with Frisco. The testimony indicates that the meeting lasted for five hours. Frisco later met with the drivers at the Williamsport terminal alone to discuss the hourly wage reduction and new method of compensation.

A TSL handbook is issued to all of the employees at the Green Tree and Williamsport terminals and each employee is required to sign for a copy upon being hired. Although some of the policies of TSL placed in evidence reference "Modern" or "MTS," the record indicates that this designation is intended to distinguish and identify the policies that TSL has promulgated at the Modern facilities from those in place at the facilities of other clients of TSL. The handbook is enforced by Shaner, Frisco and, ultimately, Benner. Benner testified that he does not have consistent contact with any employee of Modern. However, Frisco testified that he speaks with Cozzens on a regular basis.¹⁶

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¹⁶ The record does not reveal the subject of these communications.

The record reveals that Modern issues gasoline credit cards to the drivers and pays directly for these purchases. Likewise, a policy regarding overnight travel by drivers indicates that Modern, not TSL, paid for any lodging expenses accrued by the drivers.

The record indicates that a driver telephoned the Modern office in Portersville and inquired about Modern's 401(k) plan, which is not part of the TSL benefit package. He received a packet of information but never attempted to enroll. The record contains no evidence of any driver who is participating in the Modern 401(k) plan.

The record also contains evidence of one driver who acquired a discount on his personal cell phone account as a "Modern" employee. In this regard, the record indicates that Shaner allegedly told the driver he was eligible for a company (e.g., Modern) discount on a cell phone account through Verizon. The employee approached Verizon at a retail location and was denied because his paycheck, which the employee produced as his proof of employment, stated his employer was "TSL." After some email correspondence between Modern's office and Verizon, the driver was eventually awarded the discount.

The Board will find that a joint employer relationship exists when two or more employers share or codetermine essential terms and conditions of employment for particular employees.

N.K. Parker Transport, 332 NLRB 547 (2000); Laerco Transportation, 269 NLRB 324 (1984);

NLRB v. Browning-Ferris Industries of Pennsylvania, 691 F.2d 1117 (3rd Cir. 1982). A finding that companies are joint employers assumes that the employers are "separate corporate entities" that have "historically chosen to handle jointly...important aspects of their employer-employee relationship." NLRB v. Checker Cab Company, 367 F.2d 692, 698 (6th Cir. 1996).

The determination as to whether a joint employer relationship exists is essentially a factual one.

Pacific Mutual Door Co., 278 NLRB 854, 858-859, fn.18 (1986). The essential factor to consider in a joint employer relationship is whether one employer possesses sufficient control over the work of the employees of another employer. M.B. Sturgis, Inc., 331 NLRB 1298 (2000); Boire v. The Greyhound Corporation, 376 U.S. 473, 481 (1964). To establish such status there must

be a showing that the employers in question meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction. <u>TLI, Inc.</u>, 271 NLRB 798 (1984); Laerco Transportation, supra.

An examination of the record fails to establish that Modern possesses sufficient indicia of control over the working conditions of the TSL employees who staff its Green Tree and Williamsport facilities to be found a joint employer. Shaner, Frisco and Benner are all TSL employees. Therefore, it is TSL, through Shaner, Frisco and Benner, who hires, assigns work, grants time off, disciplines and terminates employees. There is no evidence to the contrary. The bargaining unit employees are hired as TSL employees and receive paychecks from TSL. TSL withholds taxes and issues W-2's to the employees. The bargaining unit employees are given TSL benefits and are subject to personnel policies which are enacted and enforced by TSL. The contract between the parties confers sole authority to TSL for all matters pertaining to the employees who staff these facilities.¹⁷ There is no evidence that Modern has ever hired an employee or terminated an employee, or effectively recommended such action. The record reveals that Modern possesses the operating authority to conduct the business of freight transportation and TSL concerns itself with matters relating to the terms and conditions of employment for the employees at issue.

The considerable testimony concerning Cozzens' request for a cut in expenses, which resulted in a wage cut for the drivers, does not require a different result. It is uncontroverted in the record that although Cozzens holds the office of President of Modern, he is a TSL employee and is paid by TSL. In this regard I note that Benner testified the final decision to cut drivers' wages was his and he was free to accept or disregard Cozzens' request to cut expenses.

¹⁷ While this fact is not controlling, there is no evidence that the parties have acted contrary to this contractual provision which states in pertinent part:

[&]quot;...The Contractor [TSL] shall...(e) Hire, fire, discipline, evaluate and direct the work and conduct of all drivers and other personnel; (f) Have sole control and responsibility for and be sole signatory under and connected with all labor negotiations, grievances, collective bargaining agreements and related items concerning the drivers and other personnel." Petitioner Ex. 25 at page 2.

I am not dissuaded in my conclusions herein by evidence introduced by the Petitioner as to business cards, signage, identification on trucks, trailers, uniforms, and hats or other external objects which proclaim the name "Modern" as these items are not intrinsic to the employment relationship of TSL with its employees. In this regard I note the record indicates although some policies given to employees are identified as pertaining to "Modern," this is for TSL identification purposes among its clients and there is no objective evidence in the record that Modern had any input into those policies. The fact that Modern paid for drivers' gasoline and travel expenses does not evidence a policy imposed on the unit employees by Modern. Rather, the evidence indicates that Modern pays for the expenses associated with the transportation of the load (e.g., fuel). However, these items are not terms and conditions of employment for the drivers but merely business expenses for the freight operator and part of the costs of moving the goods. These expenditures by Modern are not remuneration to TSL's employees.

I also note but am not deterred from my conclusions by the testimony regarding a TSL employee's receipt of a 401(k) packet from Modern. Under the Federal tax code, a plan must be available to all employees, whether directly employed or leased, to qualify the plan for the statutory tax advantages for the employer. <u>Aldworth Co.</u>, 338 NLRB 137, 140 (2002). I also note but attach no legal significance to the testimony regarding the acquisition of a cell phone discount under the "Modern" name by a TSL employee.

Based on the above and the record as a whole, I find that Modern does not possess sufficient indicia of control, nor meaningfully affect the petitioned-for employees' employment relationship to a degree to be found a joint employer of the TSL employees. I further find that TSL alone possesses and maintains control over the labor relations for the petitioned-for employees at Modern's Green Tree and Williamsport facilities and is the sole employer involved herein. H & W Motor Express, 271 NLRB 466 (1984).

III. UNIT PLACEMENT ISSUES

A. James Fallon

Fallon is considered a "jack-of-all-trades" or utility person at the Green Tree terminal. He has been employed by TSL for about ten years and has been leased to Modern and other TSL clients. Most recently, Fallon worked for Modern at its Zanesville, Ohio location and transferred to Green Tree when that location was closed about a year ago. Fallon used to be a driver and still possesses a CDL so that he could drive if needed to do so. Fallon is hourly paid and earns about \$16 per hour and receives the same benefits as the drivers. When he drives, he earns the same wages as the drivers. Fallon has also attended periodic safety meetings with the drivers and has access to the same break room that they use. Fallon reports to Shaner as the drivers do and the record indicates that he is subject to the same TSL employee handbook and other personnel policies as the drivers.

Fallon's job responsibilities are varied and he appears to function on an "as-needed" basis on any particular day. In this respect, the record indicates that he sometimes helps the mechanic in the shop, he loads trucks, and he has assisted the clerical in the office with paperwork. He regularly interacts with the drivers and the mechanic, all bargaining unit employees, as he performs duties in various areas of the terminal. He also has been called upon to drive to Williamsport or customer locations and deliver parts to drivers for their vehicles or for their use at the well sites. The record indicates that Fallon is also being trained as an onsite coordinator, a new position that is currently being developed. In this capacity, Fallon will go out to the customers' well sites and help coordinate the loads as they arrive.

The Board has addressed the issue of whether other employees belong in a unit composed primarily of drivers in a number of cases, utilizing a community of interest analysis on a case-by-case basis. In assessing community of interest, the Board considers such factors as: the method of compensation, hours of work, benefits, separate supervision, qualifications, training and skills, job functions, work situs, frequency of contact with other employees,

integration of work functions, interchange with other employees, and history of bargaining.

Overnight Transportation Co., 322 NLRB 723, 724 (1996); Kalamazoo Paper Box Corporation, 136 NLRB 134 (1962).

Based on the above and the record as a whole, I find that Fallon shares similar terms and conditions of employment with the drivers and the mechanic in the petitioned-for unit. They all hold CDL licenses and have common supervision through Shaner and Frisco. They enjoy equivalent wages and identical benefits. Fallon sometimes works side-by-side in assisting the mechanic. He performs other duties in proximity to the drivers and even occasionally works as a driver. It appears that Fallon's work is functionally related to the work of the drivers and he has regular contact with the drivers at the Green Tree terminal. Fallon sometimes has duties which take him to the Williamsport terminal and customer jobsites where other members of the petitioned-for unit are working. In these circumstances, I find that Fallon shares a sufficient community of interest with the other employees in the unit such that he should be included in the unit found appropriate herein. See, Courier Dispatch Group, 311 NLRB 728 (1993); Sampson Steel & Supply, 289 NLRB 481, 483 (1988) (Board found merit to exceptions to hearing officer's recommendation and included "jack-of-all-trades" in unit with drivers and warehousemen using community of interest analysis.)

B. Samantha Evans

Samantha Evans, the clerical employee who works in the Green Tree facility, has been working for TSL for only a few months. The record indicates that Evans' position is not new, however, as she replaced a previous employee. It appears that she is the only clerical employee of any type at the two facilities at issue here.

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¹⁸ I note that, as mentioned above, the record indicates that Fallon is being trained for a new position. As the record contains no evidence of when this transition will be complete or what his status or terms and conditions of employment will be at that time, I cannot find that the potential of a new position is sufficient to overcome his existing community of interest with the unit so as to exclude him from the unit at this time.

Evans does not have a CDL and she does not drive in her job. She answers the telephone and handles all of the necessary paperwork at the terminal. In this regard, the record indicates that Evans' primary work site is behind a counter in the office area where Shaner's office is located. She uses a computer and fills out the business' records on loads hauled and the number of hours worked by the drivers. These forms are ultimately forwarded either to TSL to be used for payroll purposes, or to Modern in Sewickley so that the end use customer can be billed. She also occasionally handles paperwork relating to repair work done by outside contractors at the facility. The record reveals that she was trained on the yard scale to weigh trucks but that she has seldom done so. The record does not indicate what percentage of Evans' work day is spent on any of her job functions.

Evans may interact with drivers if she has a question about a load or some of their paperwork and has to go to the yard and seek them out. As mentioned above, sometimes Fallon assists her with paperwork. Evans does not attend safety meetings with the other petitioned-for employees. The record indicates that she did not attend the drivers' meeting concerning the reduction in wages and there is no evidence in the record that, unlike the drivers, she suffered a wage reduction in November. Evans reports to Shaner and earns about \$14 per hour. She is subject to the same TSL personnel handbook and receives the same benefits as the other Green Tree employees. The record does not indicate if she wears any type of uniform or insignia, as the drivers do.

As the Board has stated, "the distinction between office clericals and plant clericals is not always clear." Hamilton Halter Co., 270 NLRB 331 (1984). The test generally is whether the employees' duties are related to the production process (plant clericals) or related to general office operations (office clericals). The distinction is grounded in community-of-interest concepts. Cook Composites & Polymers Co., 313 NLRB 1105, 1108 (1994).

Typical plant clerical duties are timecard collection, transcription of sales orders to forms to facilitate production, maintenance of inventories, and ordering supplies. The Kroger

Company, 342 NLRB 202 (2004); Caesars Tahoe, 337 NLRB 1096 (2002); Hamilton Halter, supra. In contrast, typical office clerical duties are billing, payroll, phone duties, and mail. PECO Energy Company, 322 NLRB 1074 (1997); Mitchellace, Inc., 314 NLRB 536 (1994); Virginia Mfg. Co., 311 NLRB 992 (1993); Dunham's Athleisure Corporation, 311 NLRB 175 (1993). Under appropriate circumstances, plant clerical employees may be included in a bargaining unit when they share a sufficient community of interest with the employees in a facility-wide unit. Kroger, supra; Caesars Tahoe, supra; Brown & Root, Inc., 314 NLRB 19 (1994); Raytee Company, 228 NLRB 646 (1977).

Based on this record, I cannot determine Evans' eligibility to vote in the election directed herein in a unit composed primarily of drivers. She does not have a CDL or any type of certification similar to that possessed by other members of the unit. There is no evidence that she ever performs any bargaining unit work. There was testimony concerning her duties in collecting data for reports but there was insufficient specific information concerning her connection to unit work and contacts with unit members to evidence that she shares a community of interest with the bargaining unit which would require her inclusion in the unit. While there was cursory testimony concerning the types of information she works with (i.e. load reports and payroll), there is no evidence in the record concerning the amounts of time spent on the types of assignments which may be considered plant clerical work, as compared with time spent in other endeavors which may be considered office clerical work. It is clear that the presence of unit-related duties and contacts are critical factors in the Board's analysis of this type of situation. I note that Evans is the only clerical employee at either the Green Tree or Williamsport locations and there is no explanation in the record as to who performs all of the Employer's office clerical functions if she does not.²⁰ However, as the decision to exclude an

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¹⁹ I note that Evans did not testify at the hearing.

²⁰ It is not appropriate to include her in the unit simply based on the fact that she is the only clerical employee, as urged by Modern in its brief.

employee from voting eligibility and a bargaining unit is not made lightly, I will permit Evans to vote subject to challenge in the election.

IV. THE APPROPRIATE UNIT

In my Decision in Case 6-RC-12706, I found that the single-facility presumption had been overcome and that the single facility unit petitioned-for in that case was not appropriate. My analysis and conclusion in that regard were detailed in the Decision and I shall not repeat it in total here.

However, I will reiterate my reliance on Board law which states that the presumptive appropriateness of a petitioned-for single location unit was rebutted where the evidence demonstrated the complete lack of any separate supervision or other oversight at the petitioned-for locations and where the evidence further demonstrated common supervision at both facilities, centralized control over daily operations, identical skills, duties and other terms and conditions of employment among employees and regular contact between employees employed at the two facilities. These factors, in the Board's view, outweighed several factors which favored the single-facility presumption—geographical distance and lack of specificity as to the level of interchange. E.g. <u>Trane</u>, 339 NLRB 866 (2003); <u>Waste Management Northwest</u>, 331 NLRB 309 (2000); R & D Trucking, Inc., 327 NLRB 531 (1999).

Analyzing the facts of the instant situation in light of the applicable criteria, I found that burden of presenting evidence rebutting the single-facility presumption had been met. The Williamsport terminal appears to be an outgrowth of the Green Tree terminal and, based on the record evidence, it lacks an individual identity. The Williamsport terminal is managed from Green Tree. Drivers working out of the Williamsport terminal receive their assignments from Green Tree, where all customer orders are received. All of the drivers are directly supervised by Frisco and Shaner. Overall, the record demonstrates that the operation of the Williamsport terminal is completely dependent on the operation of the Green Tree terminal.

In sum, the record demonstrates that there is centralized control over daily operations and common supervision in that Frisco and Shaner are responsible for meeting customer

demands, scheduling and assigning runs and handling minor disciplinary matters. Centralized control over labor relations is also established in that wages, benefits, and employment policies are all established by TSL's corporate office, and are uniformly applied at both terminals. The drivers at both the Green Tree and Williamsport terminals utilize the same equipment to perform the same work, often for the same customers, which requires them to be identically licensed and skilled. Interchange and interaction among drivers from the two terminals occurs regularly. The record demonstrates that since the Williamsport terminal opened, drivers from this terminal often work out of the Green Tree terminal, and drivers from the Green Tree terminal work out of the Williamsport terminal. Finally, there has been no bargaining history for any of the employees involved herein.

Accordingly, I find that a unit composed of TSL's petitioned-for employees working at both the Green Tree and Williamsport, Pennsylvania Modern facilities is an appropriate one for the purposes of collective bargaining.

V. FINDINGS AND CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above. I find and conclude as follows:

- 1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
- 2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this matter.
 - 3. The Petitioner claims to represent certain employees of the Employer.
- 4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees²¹ of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time drivers, mechanics and utility employees, employed by TSL, Ltd. and leased to Modern Transportation Services, Inc. at the Green Tree and Williamsport, Pennsylvania facilities; excluding office clerical employees, and guards, professional employees and supervisors as defined in the Act and all other employees.

VI. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by General Teamsters, Chauffeurs and Helpers, Local No. 249 a/w International Brotherhood of Teamsters. The date, time and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as

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²¹ As noted previously, Samantha Evans is permitted to vote subject to challenge in the election directed herein.

their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. <u>Employer to Submit List of Eligible Voters</u>

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. <u>Excelsior</u>
Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list containing the <u>full</u> names and addresses of all the eligible voters. <u>North Macon Health Care Facility</u>, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, William S. Moorhead Federal Building, 1000 Liberty Avenue, Room 904, Pittsburgh, PA 15222, on or before **April 2**, **2010.** No extension of time to file this list will be granted, except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections

are filed. The list may be submitted by facsimile transmission at 412/395-5986. Since the list will be made available to all parties to the election, please furnish a total of **two (2)** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three (3) full working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five (5) full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so precludes employers from filing objections based on non-posting of the election notice.

VII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001.²² This request must be received by the Board in Washington by **April 9, 2010**. The request may be filed

²² A request for review may be filed electronically with the Board in Washington, D.C. The requirements and guidelines concerning such electronic filings may be found in the related attachment supplied with the Regional Office's initial correspondence and at the National Labor Relations Board's website, www.nlrb.gov, under "E-Gov." On the home page of the website, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-Filing instructions explaining how to file the documents electronically will be displayed.

electronically through E-Gov on the Agency's website, <u>www.nlrb.gov</u>,²³ but may <u>not</u> be filed by facsimile.

Dated: March 26, 2010

Robert W. Chester, Regional Director

NATIONAL LABOR RELATIONS BOARD Region Six William S. Moorhead Federal Building 1000 Liberty Avenue, Room 904 Pittsburgh, PA 15222

Classification Index 177-1765-0000-0000 420-2900-0000-0000 440-1760-1900-0000 440-1760-6200-0000 737-7024-6783-0000

²³ To file the request for review electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlrb.gov.